No. 4535 ~~4584~~

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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DAVID PEARLMAN,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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STATEMENT.

David Pearlman, plaintiff in error, prosecutes a writ of error to the District Court of the Northern District of California to reverse a sentence imposed against him upon his conviction of the violation of the National Motor Vehicle Theft Act.

On September 29, 1922, he was indicted by the Grand Jury of the District Court wherein it was charged that:

> "On or about July 28th, 1922, in violation of Section 3 of the National Motor Vehicle Act of October 29th, 1919, did unlawfully, wilfully, knowingly and feloniously transport, and cause to be transported in interstate commerce,

> to wit, from the city of New York, in the State of New York, to San Francisco, in the Southern Division of the Northern District of California and into the jurisdiction of this Court, a certain motor vehicle, to wit, a Cadillac automobile, Motor No. 18664, said defendant then and there well knowing that at the time of said transportation, the said motor vehicle had been stolen."

Upon his conviction he was sentenced to be imprisoned for five years in the United States Penitentiary at Leavenworth.

There is a bill of exceptions containing the testimony and the court's charge. There was a motion for a directed verdict made and denied. There were numerous objections taken on the receipt of testimony. The charge was not objected to or excepted to except a single exception on the occasion of the return of the jury for further instructions (Tr. p. 69).

We do not here set forth a statement of the testimony; pertinent portions will be referred to in our argument.

Reference need not be made to the eighteen assignments of error made by the defendant or to the numerous objections to testimony appearing in the record; for, as we conceive it from the argument of counsel, there is but a single question in the case. That is to say, whether the proofs of the government measure up to the rule that there must be testimony tending to prove the *corpus delicti* independent of any confession of the defendant.

ARGUMENT.

I.

THERE WAS SUFFICIENT EVIDENCE TO JUSTIFY THE CONVICTION OF THE DEFENDANT; HIS CONFESSION OF GUILT DID NOT STAND ALONE; THERE WAS SOME COROBORATION SUFFICIENT TO TEST THE TRUTH OF THE CONFESSION AND THIS COROBORATION TOUCHED THE CORPUS DELICTI.

It is not to be doubted that the defendant was guilty of transporting in interstate commerce a motor vehicle which he knew had been stolen at the time.

It is true that the most cogent evidence of guilt in the record was the defendant's statement. Upon his arrest he was interviewed by several officers. He was shown to have been in possession of the motor car described and when asked about it said, "Well, you have me and that is all there is to it". (Tr. p. 35.) He further stated that he had purchased the car in New York City in front of Brown's Auction House (Tr. p. 36). As to his method of getting to San Francisco he stated that he had gone out from New York as far as Salt Lake City and had gone from Salt Lake City to Los Angeles via one of the trails (Tr. p. 36). He said to Agent Adams in a later conversation about the car, said that he did not know it was a stolen car until a few days after he left New York (Tr. p. 56). He said he knew it was a stolen car (Tr. p. 57). He sold the car to a man named Leong at San Francisco on September 6th for $2100 and

Leong's car, a 1917 Cadillac (Tr. p. 38). He gave Leong a bill of sale for the car (Tr. p. 40) and when Leong went to the State Motor Vehicle Department to obtain a license and saw a Mr. Britt (Tr. p. 39), an official of the department, made an inspection of the car (Tr. p. 28). There was found evidence that the motor number had been altered and obliterated (Tr. p. 30) so as to indicate an impossible number for the type of car concerned (Tr. p. 30). Thereupon Britt took possession of the car and notified police detectives (Tr. p. 31). At Fourth and Townsend they found the Cadillac which Leong had sold to defendant (Tr. p. 31). Thereupon the parties went to San Jose and found the defendant, he was arrested; taken to police department and searched. He was found to be in possession of $600. When asked what became of the $2100 that had been given him by the Chinaman (Tr. p. 35) he said he owed a party $1500 and had forwarded that day and was in possession of the $600 when searched. Asked about the car abandoned at Fourth and Townsend, said, "Well, you have me and that is all there is to it". It was further shown that the car in question was on September 6, 1922, sold by defendant to a Chinese Leong, taking his car in part payment, and that he produced to Leong's attorney Ehrlich a bill of sale for the car from a man in Los Angeles whose name is Lewis (Tr. pp. 52, 53). This bill of sale was seen by witness Adams last in the possession of a Mr. Michelson, the defendant's attorney at that

time. Adams stated that it was dated at Los Angeles (Tr. p. 20), and dated the 14th of August (Tr. p. 23), and that the heading on the stationery was Lewis (Tr. p. 24). It was further shown that Adams at the time he examined it noticed the number on the motor as 18664, and that in his examination of the motor block he noticed a change or attempt to change the number (Tr. p. 26). The defendant had stated to the same witness Adams that he purchased the car in New York from a second hand auto market at Third Avenue and 18th Street (Tr. p. 18); this was on July 28th (Tr. p. 22). The defendant left New York July 29th or 30th and got to San Francisco September 6th (Tr. p. 22). The same witness said that the defendant also had a bill of sale for the car issued in Los Angeles made out by a man by the name of Lewis, some second hand auto dealer. It was further shown by the testimony of the witness Britt, who was connected with the State Motor Vehicle Department that he had been examining automobiles for ten years or thereabouts (Tr. p. 59); that the car in question was identified through a secret unit number (Tr. p. 59) which appears on all automobiles and which gives the entire history of all cars and the automobile record (Tr. p. 60) and that this number was 61 A 130 (Tr. p. 62) and that such would be sufficient to identify the car (Tr. p. 61). The same witness had said that the number appearing on the motor block *could not have been correct.* It would

not be possible for a 1922 Cadillac Sedan to have the engine number 18664.

It was further shown by production of the register of the Newhouse Hotel at Salt Lake City that the defendant registered at that Hotel on August 10, 1922, and checked out on the 12th.

Accordingly, it appears that the defendant transported the Cadillac car in question from New York by way of Salt Lake City to Los Angeles, thence to San Francisco, and he knew the car had been stolen during at least the latter portion of the trip. Such admissions would be equivalent to a confession of guilt of all of the elements of crime. The indictment charges the offense in the language of the statute and the confession would be of facts equivalent to the averments of the indictment. There can be no reasonable doubt of the defendant's guilt or of his just conviction.

The sole defense of the defendant appears to be his technical contention, having some basis in the authorities, that his confession could not be taken as sufficient proof of his guilt, unless corroborated by proof of the *corpus delicti*. Certain California cases are cited in support of his contention.

We think the true rule on the point referred to, as far as the federal courts are concerned, is to be gathered from the cases hereinafter cited and is to the effect that such a confession is sufficient to establish guilt if the jury is convinced of guilt beyond a reasonable doubt, provided there be *some*

corroboration and that this corroboration must pertain to the *corpus delicti.* The separate corroboration, however, need not be sufficient to establish the *corpus delicti* beyond a reasonable doubt, or even be a preponderance, nor need it go to all the elements of the *corpus delicti;* it is sufficient that in the respect of the *corpus delicti* it is such corroboration as tests the truth of the defendant's confession and tends to show that he told the truth.

16 *Corpus Juris,* p. 735;
"Common Law," Sec. 1514.

Thus in the case of

Daesche v. U. S., 250 Fed. 566, 571,

the Circuit Court of Appeals of the Second Circuit said:

> "It must be conceded that there has been a very general concordance of judicial opinion in the United States that some sort of corroboration of a confession is necessary to conviction, and this concordance has extended to federal courts as well as elsewhere. U. S. v. Williams, 1 Cliff. 5, 28 Fed. Cas. No. 16,707; U. S. v. Boese, (D. C.) 46 Fed. 917; U. S. v. Mayfield, (C. C.) 59 Fed. 118; Flower v. U. S., 116 Fed. 241, 53 C. C. A. 271; Naftzger v. U. S., 200 Fed. 494, 118 C. C. A. 598; Rosenfeld v. U. S., 202 Fed. 469, 120 C. C. A. 599. That the rule has in fact any substantial necessity in justice, we are much disposed to doubt, and indeed it seems never to have become rooted in England. Wigmore, Sec. 2070. But we should not feel at liberty to disregard a principle so commonly accepted, merely because it seems to us that such evils as it corrects could be much more flexibly treated by the judge at trial, and even though

we should have the support of the Supreme Court of Massachusetts in an opposite opinion. Com. v. Killion, 194 Mass. 153, 80 N. E. 222, 10 Ann. Cas. 911. We start therefore, with the assumption that some corroboration is necessary, and the questions are to what extent must it go, and how shall the jury deal with it after it has been proved. The corroboration must touch the corpus delicti in the sense of the injury against whose occurrence the law is directed; in this case, an agreement to attack or set upon a vessel. Whether it must be enough to establish the fact independently and without the confession is not quite settled. Not only does this seem to have been supposed in some cases, but that the jury must be satisfied beyond a reasonable doubt of the corpus delicti without using the confessions, before they may consider the confessions at all. Gray v. Com., 101 Pa. 380, 47 Am. Rep. 733; State v. Laliyer, 4 Minn. 368 (Gil. 277); Lambright v. State, 34 Fla. 564, 16 South 582; Pitts v. State, 43 Miss. 472. But such is not the more general rule, which we are free to follow, and under which any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession. Independently they need not establish the truth of the corpus delicti at all, neither beyond a reasonable doubt nor by a preponderance of proof. U. S. v. Williams, supra; Flower v. U. S., supra; People v. Badgley, 16 Wend. (N. Y.) 53; People v. Jachne, 103 N. Y. 182, 199, 8 N. E. 374; Ryan v. State, 100 Ala. 94, 14 South. 868; People v. Jones, 123 Cal. 65, 55 Pac. 698."

And in the case of

Rosenfeld v. U. S., 202 Fed. 469,

it was said:

> "A conviction cannot be had on the extra-judicial confession of the defendant, unless corroborated by proof aliunde of the corpus delicti. Full, direct, and positive evidence, however, of the corpus delicti is not indispensable. A confession will be sufficient if there be such extrinsic corroborative circumstances as will, when taken in connection with the confession, establish the prisoner's guilt in the minds of the jury beyond a reasonable doubt. Flower v. United States, 110 Fed. 241, 53 C. C. A. 271; 6 Am. & Eng. Ency. of Law, (2d Ed.) p. 582; Bines v. State, 118 Ga. 320, 45 S. E. 376, 68 L. R. A. 33."

This court has had occasion to apply the same principles in the case of

Mangum, 289 Fed. 213, 216.

In that case it is true that the case was not so close, but the court recognized the rule to be merely that there should be some corroboration and cited the same authorities referred to by Judge Hand in the case of

Daesche v. U. S., supra.

It is charged that the transportation was from the City of New York to San Francisco, California. But it is well established that it would not be necessary to prove the transportation during the whole route alleged. A portion thereof would be sufficient so long as it was from a point out of the State of California into the State of California.

Malcolm v. U. S., 256 Fed. 363.

It is thus seen that in addition to the quite pertinent confession of guilt made by the defendant the

truth of his statement was corroborated by the circumstances that he was found in possession of a Cadillac car containing a spoliated and altered engine number so that apparently the car could not have been identified from any other of the same type. It was only through the expert knowledge of an official that the true identity could be obtained, a circumstance probably not known to the defendant. The alteration of this engine number could have been made but for one purpose—to conceal the previous theft of the car. It was not necessary to show that the defendant stole the car himself or that any particular person stole it at any particular place. It need only be shown that it had the status of a stolen car at the time it was moved across the California line. The altered engine number was taken to indicate that it was such stolen car. Had defendant altered the number or even knew of the alteration would be immaterial for he admitted that he knew the car was stolen. If it was in fact stolen that element of the *corpus delicti* is established. The story of the defendant is further corroborated by independent proof that at the time he stated he was on the trip and reached Salt Lake City, he had in fact reached Salt Lake City and was sojourning there two days. There is further corroboration of his confession of his guilt in that he had made conflicting statements as to the origin of his ownership. He stated he had purchased it at New York. He was found to have possession of a bill of sale apparently issued in

Los Angeles. In the matters hereinabove quoted may be seen other independent corroborations sufficient to bring the case within the rule of the holding of the Circuit Court of Appeals for the Second Circuit in the case of *Daesche,* supra.

CONCLUSION.

In conclusion we say that upon the only substantial point discussed by plaintiff in error, to wit, that there was not sufficient corroboration of his story of guilt to authorize conviction, it is seen that there was sufficient outside evidence to test the truth of his story within the rule of the federal court cases cited, and that his conviction should be upheld.

Respectfully submitted,

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